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IN THE

Supreme Court of the United States

October Term, 1969

No. 852

HYMAN STERNMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 24, 1969.

Opinions Below

The unreported opinion of the United States District Court for the Northern District of Ohio, Western Division (A. 53),* the opinion of the United States Court of Appeals

* Citations containing the prefix "A" refer to page numbers of the Appendix filed by petitioner in the United States Court of Appeals for the Sixth Circuit, which has been filed as part of the certified record in this Court.

for the Sixth Circuit (not yet officially reported) and the unreported opinion of the latter court on rehearing are in Appendix B hereto, *infra*, pp. 6a-18a.

Jurisdiction

The judgment of the Court of Appeals was entered on June 24, 1969. A timely petition for rehearing was denied on October 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether an indictment alleges all "essential facts constituting the offense charged," as required by Rule 7(c), F. R. Crim. P., when, charging the crime of contempt of court under 18 U.S.C. §401 for refusal to obey an order to answer questions before a grand jury, it fails to allege (a) that the accused had been granted immunity under an applicable statute, (b) the subject of the grand jury investigation, and (c) the questions the accused declined to answer.

2. Whether an equivocal plea of guilty, whereby the defendant, appearing without counsel, expressly denies his guilt of the essence of the crime charged, can be validated by inconclusive statements made by the defendant days before and days after the entry of the plea.

3. Whether a defendant's conclusory statement that he does not wish counsel and that he understands the charge against him effects a knowing and intelligent waiver of

counsel, when the defendant's questions and statements during the entire proceedings demonstrate his lack of understanding of the charge and possible defenses thereto.

4. Whether a defendant is guilty of contempt when, having been granted immunity from prosecution in the United States, he agrees to answer all questions except those relating to the period he resided in Canada, which he refuses to answer on the ground that those answers might tend to incriminate him under the laws of Canada, where he is not immune from prosecution.*

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States, Section 401 of Title 18 of the United States Code, and Rules 7, 32 and 34 of the Federal Rules of Criminal Procedure, which are involved, are set out verbatim in Appendix A, *infra,* pp. 1a-5a.

Statement

On February 14, 1968, petitioner Hyman Sternman, an individual with little education (A. 11), while a United States prisoner, was brought to testify before a grand jury in the Northern District of Ohio, Western Division (A. 5). Just six months earlier he had appeared before a grand jury in the same district and had been excused after exer-

* If certiorari is granted, petitioner also intends, with the Court's permission, to raise the issue of the trial court's failure to comply with Rule 11, F. R. Crim. P., in accepting petitioner's plea of guilty. For explanation of this issue, see A. 50-51 and Point II(C) of Appellant's Brief below.

cising his right to decline to answer questions on the ground of self-incrimination (A. 16). This time, he stated that he would answer any questions relevant to the period of time he lived in the United States, but declined, on the ground of self-incrimination, to answer any questions on the years he lived in Canada (A. 6).

Petitioner, without counsel, was then brought before the Court, where Government counsel stated that, pursuant to 47 U.S.C. § 409(1), petitioner had been granted immunity (A. 5). The Court advised petitioner that "[a] man can't be compelled to give testimony which tends to incriminate him, but if the testimony is not going to incriminate him because he is granted immunity when he gives it, then he cannot refuse to give it; and if he does refuse to answer questions, then it lays him open to charges of contempt of Court, which carry very severe penalties" (A. 6-7). Petitioner responded that he understood, but that he also understood "that anything pertaining to * * * anything I did in Canada, I feel * * * I don't have to talk about in the American court" (A. 7) — obviously trying, as best he could, to articulate a defense that the immunity granted could not safeguard him from prosecution in Canada. Without responding to petitioner's point, the Court ordered him "unequivocally to return to the grand jury room and to answer any questions" put to him (A. 11).

Since petitioner was without counsel, the Court asked whether he desired to be represented by counsel. He replied that he did not since "I don't believe I have any rights at all" (A. 5). He expressly told the Court that he did not "know how to explain" his position but "wish[ed]" he "knew how."

On February 19, 1968, petitioner returned to court to plead to an indictment charging him with a violation of 18 U.S.C. §401 for having disobeyed a "lawful order to answer the questions to be asked in the conduct of the Grand Jury proceeding" (A. 13-14). The indictment did not allege any grant of immunity, the statute authorizing the immunity, the subject matter of the grand jury investigation, or any of the questions petitioner refused to answer.

When asked by the Court whether he desired an attorney, petitioner replied that he did not, but instead "would like to discuss the matter" with the Court (A. 15). The questions petitioner posed to the Court indicate his total lack of understanding of the proceedings. For example, petitioner again asked whether he had "any rights at all." In an endeavor to understand the nature of a contempt proceeding, he sought an explanation of the difference between his prior appearance before the grand jury—when he also declined to answer questions but was *not* indicted for contempt—and this appearance—when he declined to answer questions and was indicted for contempt. Instead of explaining the crucial difference—*i.e.*, that the Government now claimed to have granted him immunity—the Court merely replied "that I cannot answer. I have no idea why that was" (A. 16). Petitioner asked whether he could obtain a copy of the grand jury minutes covering his appearance before it. After commenting that this was "a rather complicated legal problem," the Court advised defendant that "[y]our plea in this case has nothing to do with that." Petitioner's quest for understanding was cut short when the Court responded that it "cannot advise

people about the specific legal problems'' but ''can talk only in generalities'' (A. 19). After again refusing the aid of counsel, shortly after twice reiterating his belief that he had no rights (A. 19, 21), petitioner agreed to enter his plea, which reads as follows:

> ''I plead guilty but not for not answering questions to the Grand Jury as you have ordered me to'' (A. 22).

The Court then asked him whether he understood the charge contained in the indictment, and accepted petitioner's conclusory reply ''I think so, your Honor'' (A. 22), without any inquiry to elicit his verbalization of that understanding. Then, after advising petitioner that the plea of guilty permitted the Court to impose any amount of fine or imprisonment, and eliciting petitioner's conclusory concurrence that he was entering his plea of his own free will and accord, without threats or promises, the Court accepted the plea (A. 23). No further questions were asked of petitioner to elicit petitioner's understanding of the significance of the proceedings, the nature of the charge against him, the extent of his rights or the factual basis for his plea.

On February 21, 1968, petitioner was brought before the Court for sentencing. He was asked if he desired to change his plea and he responded that he knew he had pleaded guilty and would ''stand on it'' (A. 30). He was then sentenced to a term of imprisonment of three years (A. 30).

Following imposition of sentence, petitioner retained counsel, from whom petitioner, for the first time, learned of the existence of legal defenses which, unknown to him at the time he entered his plea, he could have interposed, including: (a) the insufficiency of the indictment; (b) the

inefficacy of the grant of immunity to immunize him from prosecution for crimes committed during his permanent residency in Canada; and (c) the misuse of the grand jury (A. 37, 46-47).

Counsel thereafter moved on his behalf pursuant to Rules 32(d) and 34, Federal Rules of Criminal Procedure to withdraw his plea of guilty and to arrest the judgment herein (A. 33-34). In its opinion of July 11, 1968, the District Court concluded that the indictment was "sufficient" and indicated that, although petitioner's legal arguments regarding the validity of his plea and waiver of counsel were "powerfully persuasive," the Court's subjective impression that petitioner was "contemptuous" and determined not to comply with its orders would be controlling. Without discussing any of petitioner's cited authorities, the District Court denied the motion.

On June 24, 1969, the Court of Appeals for the Sixth Circuit affirmed. It held, *inter alia,* (a) that this Court's decision in *Russell* v. *United States,* 369 U.S. 749 (1962) was inapplicable to the instant indictment which, despite the omissions noted *supra* p. 5, was sufficient under Rule 7(c); (b) that petitioner's equivocal guilty plea, if considered alone, would have been invalid under *Hulsey* v. *United States,* 369 F.2d 284 (5th Cir. 1956), but that the defect was cured by statements he made five days before the plea, and by his affirmance two days thereafter that he had, in fact, pleaded guilty; and (c) that petitioner's repeated rejection of the Court's offers of counsel during his three appearances was alone sufficient to permit the inference that he had knowingly and intelligently waived his

right to counsel in accordance with *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948). While denying, on October 17, 1969, petitioner's timely motion for rehearing, the Court amended its prior opinion to hold invalid petitioner's contention that the proffer of immunity was insufficient to protect petitioner from prosecution for crimes committed while he was a Canadian resident, a defense ignored in the Court's initial opinion.

Reasons for Granting Writ

As hereinafter shown, several bases for granting certiorari are found in the various issues raised by this petition: conflict among the circuits; conflict with applicable decisions of this Court; and important questions not yet determined by this Court.

1. The decision below is in conflict with this Court's opinion in *Russell* v. *United States,* 369 U.S. 749 (1962), and with a decision by the Court of Appeals for the Third Circuit.

In *Russell,* this Court held that, to comply with the mandate of Rule 7(c), F.R. Crim P., that all "essential facts" be alleged, an indictment, for contempt of Congress by refusal to answer questions, must set forth the subject under investigation (*id.* at 753), and the questions which the defendant refused to answer (*id.* at 764). The contempt statute involved in *Russell* (2 U.S.C. § 192) required that the questions asked be "pertinent to the question then under inquiry" and the indictment there

contained only a conclusory allegation to that effect. In voiding the indictment, this Court held:

> "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *Id.* at 764.

The indictment in the instant case likewise simply repeats the language of the criminal statute, 18 U.S.C. § 401, which requires that the order to answer questions must be a "lawful" one. But, as in *Russell,* because the guilt of the accused "depends so crucially upon" the lawfulness of the order to answer questions, "the indictment must do more than simply repeat the language of the criminal statute." It must, as petitioner contends, allege facts establishing that the order to answer incriminatory questions was "lawful"—*i.e.,* a valid grant of immunity under a specified statute [*Murphy* v. *Waterfront Comm'n,* 378 U.S. 52 (1964); *Stevens* v. *Marks,* 383 U.S. 234, 244-46 (1966)], the subject under investigation by the grand jury, and the questions the accused refused to answer. *Marcus* v. *United States,* 310 F.2d 143, 146 (3d Cir. 1962), *cert. denied,* 372 U.S. 944 (1963).

The Court below construed *Russell* as limited to contempts of Congress, and, therefore, inapplicable to the instant case, involving contempt of court. As the foregoing cases show, the rule of *Russell* is much broader, and it invalidates the indictment here. Since the Court below thus "misconceived the meaning of" the *Russell* decision in reaching a decision contrary to *Russell's* holding and import, it should be reviewed by this Court. *Wilkinson* v.

United States, 365 U.S. 399, 401 (1961); *cf. Wilson* v. *Schnettler,* 365 U.S. 381, 383 (1961).

If, however, the Court below correctly construed *Russell* as limited to contempts of Congress, the issue raised here —the sufficiency of an indictment charging contempt of court for refusing to answer questions before the grand jury—is one upon which this Court has never passed. In addition, the decision below is in conflict with decisions in other circuits which have indicated that an indictment (or a notice under Rule 42(b), F.R.Crim.P., which serves the same function as an indictment in contempt cases), charging contempt for refusal to answer questions before a grand jury, must set forth the questions the accused refused to answer. *Marcus* v. *United States, supra,* 310 F.2d at 146; *United States* v. *Pagano,* 171 F.Supp. 435 (S.D.N.Y. 1959). In view of the increasing usage of criminal contempt proceedings for conduct before grand juries [*e.g.,* New York Times, April 13, 1969, p. 70, col. 3; *id.,* June 26, 1969, p. 1, col. 2], the question of what allegations such an indictment must contain is an important question which should be decided by this Court, in accordance with the basic principles enunciated in *Russell.*

2. Petitioner, when asked to plead, stated "I plead guilty, but not for not answering questions to the Grand Jury as you have ordered me to." In sustaining the acceptance of this statement as a plea of guilty, the decision below is in direct conflict with the decisions of the Courts of Appeals for the Fifth Circuit in *Hulsey* v. *United States,* 369 F.2d 284 (5th Cir. 1956), the Third Circuit in *United States ex rel. Crosby* v. *Brierley,* 404 F.2d 790, 801 (3d Cir. 1968), and the Eighth Circuit in *Bergen* v. *United States,*

145 F.2d 181, 188 (8th Cir. 1944). The rule enunciated in these cases is that under due process

> "a fundamental requisite of a plea of guilty is that it manifest an unequivocal and knowledgeable admission of the offense charged and should not be accepted if so limited or conditioned that it constitutes * * * little more than an ambiguous expression of qualified guilt coupled with a protestation of innocence." *Hulsey* v. *United States, supra,* 369 F.2d at 287; and quoted with approval in *United States ex rel. Crosby* v. *Brierley, supra,* 404 F.2d at 799 and 801.

Petitioner's plea here was precisely what was held to be unacceptable in the foregoing cases. The Court below so conceded, stating that if faced only with the words of the plea, "reversal on the strength of *Hulsey* would seem to be required" (see Appendix B, *infra,* p. 14a). Yet the Court below held the defects to have been cured by unconnected statements, made by petitioner several days before and several days after the entry of the plea, which statements were also not unequivocal admissions of the offense charged (A. 8, 11, 26, 30).*

* The Court below relied primarily on petitioner's affirmation, at the time of sentencing, that he had "pleaded guilty to not obeying [the Court's] order." But, to paraphrase a recent opinion of this Court "it is certainly conceivable that he may have intended to acknowledge only that he in fact * * * [disobeyed the court's order to answer questions] without necessarily admitting that he committed the crime charged" of disobeying a *lawful* order. *McCarthy* v. *United States,* 394 U.S. 459, 471 (1969).

The Court below expressly found that petitioner's statements indicated his belief, during the District Court proceedings, that "he could not legally be required to answer questions concerning his activities in Canada" (see Appendix B, *infra,* p. 15a). Such belief would be inconsistent with a plea of guilty to the indictment charging disobedience of a *lawful* order, and consistent with his denial that he was pleading guilty for not answering questions as ordered concerning the period he resided in Canada.

Accepting *arguendo* that the record as a whole could possibly support a finding that petitioner fully understood the nature of the charge against him, the holding below is nevertheless contrary to the decision in *Hulsey,* which specifically held that an equivocal plea is invalid "even assuming, as the record as a whole indicates, that appellant may have been sufficiently aware of the elements of the charges against him and the maximum limits of punishment." 369 F.2d at 287.

The rule of *Hulsey, Brierley* and *Bergen* is thus very strict; nothing in those cases permits an equivocal and ambiguous plea to be "cured" by reference to colloquies between the court and defendant at times totally removed from the taking of the plea.

Moreover, the record, as a whole, refutes any conclusion that the equivocation in the plea was corrected. For example, the Court below ignored other portions of the record wherein petitioner attempted to articulate a substantive defense based on the failure of the grant of immunity to shield him from prosecution in Canada. A similar layman's attempt by a defendant to articulate a defense was considered in both *Bergen* and *Brierley, supra,* to constitute "as much a part of his plea as was the word 'guilty' " thus rendering the plea invalid. *Bergen* v. *United States, supra,* 145 F.2d at 188; *United States ex rel. Crosby* v. *Brierley, supra,* 404 F.2d at 801. The conflict between the decision below and those in *Hulsey, Brierley* and *Bergen, supra,* is thus very clear.

This Court has never spoken on the application of due process requirements to the acceptability of an equivocal

plea of guilty. The question has arisen in Courts of Appeals on several occasions (producing, as demonstrated, a conflict of opinion) and in the highest courts of several states. *E.g., State* v. *Olsen,* 270 Minn. 329, 133 N.W. 2d 489 (1965); *People* v. *Morrison,* 348 Mich. 88, 81 N.W. 2d 667 (1957); *State* v. *Stacy,* 43 Wash. 2d 358, 261 P.2d 400 (1953). It is obviously a problem of continuing importance to the administration of criminal justice in the federal courts, for as this Court has recently noted in *McCarthy* v. *United States,* 394 U.S. 459, 463 n.7 (1969), more than 80 per cent of all convictions in the federal courts are obtained on guilty pleas. This Court should resolve the important conflict here presented.

3. Petitioner was permitted to enter his plea without the assistance of counsel. The decision of the Court below, in finding that petitioner had effectively waived his right to counsel, is in conflict with the decisions of this Court and the Court of Appeals for the Third Circuit.

The Court below held that a finding that petitioner had knowingly and intelligently waived his right to counsel could be "reasonably inferred" solely from the frequency of petitioner's rejection of the Court's suggestion that he consult counsel.* In deeming conclusive the number of times petitioner repeated his rejection of counsel, the Court below implicitly held that a defendant's waiver of counsel,

* The only other factor mentioned by the Court below to uphold the waiver of counsel, was that petitioner had talked with an attorney the day *before* he was brought to the grand jury (A. 6). But at that time, petitioner still did not know why he had been brought to Ohio (A. 6). Since the record is otherwise silent as to this conversation with an attorney, it would be sheer speculation to rely on it in finding a valid waiver of counsel.

invalid due to lack of knowledge, becomes valid and knowingly entered by mere repetition. The Court below thus ignored the established minimum standards for an effective waiver of counsel enunciated in *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948), and *Meadows* v. *Maxwell*, 371 F.2d 664 (6th Cir. 1967), although it cited those cases in upholding the sufficiency of the waiver.

The opinion in *Von Moltke, supra*, 332 U.S. at 723-24 described as "serious and weighty" the trial judge's responsibility of deciding whether to accept a defendant's waiver of counsel, and stated:

> "A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered"

and

> "The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, * * * possible defenses to the charges, * * * and all other facts essential to a broad understanding of the whole matter."

The District Court here failed to make the "penetrating and comprehensive examination of all the circumstances" required by *Von Moltke* in order to validate a waiver of counsel. The District Court did not "investigate as long and as thoroughly as the circumstances" demanded, but was content instead to ask five routine questions which

elicited only conclusory answers from petitioner, including his statement that he *thought* he understood the charge (A. 22). In affirming, the Court of Appeals necessarily held that a waiver of the right to counsel can be validated by such brief questioning, eliciting only conclusory answers, without any effective probing of petitioner's actual knowledge, and despite his utter confusion and bewilderment revealed by the rest of the record.

Such conclusory answers to routine questions were specifically held to be an insufficient basis for finding an intelligent waiver of counsel in *United States ex rel. McDonald* v. *Commonwealth*, 343 F.2d 447, 451 (3d Cir. 1965). Here, as in *McDonald*, the record conclusively demonstrates that petitioner was unaware of and did not understand his rights or the nature of the charge against him. For example, petitioner constantly reiterated his belief that he had no rights at all. Furthermore, as noted pp. 4-5, *supra*, his questions conclusively demonstrated his lack of comprehension of the concept of immunity, crucial to an understanding of the charge against him. Finally, there was no discussion whatsoever, as required by *Von Moltke*, of petitioner's knowledge of possible defenses (A. 15-24; and see paragraph 4, *infra*). This conflict, between the Court below and the decisions in *Von Moltke* and *McDonald* requires resolution by this Court.

4. As noted *supra* p. 4, petitioner agreed to answer all questions except those relating to the period he resided in Canada, where the grant of immunity in United States Courts would not protect him from prosecution. The District Court ignored petitioner's repeated requests for guid-

ance on this matter and instead directed him to answer all questions posed to him.

Petitioner's post-sentence motion pursuant to Rule 32 (d), F.R. Crim. P., was based, in part, on the argument that, when petitioner waived his right to counsel and entered his equivocal plea of guilty, he did not have a full understanding of possible defenses to the indictment. Petitioner urged below, *inter alia*, that he did not understand that he could have defended against the contempt charge on the ground that the grant of immunity could not immunize him from prosecution in Canada. The District Court ignored the merits of this defense. The Court of Appeals initially held that there was "no contention here that the proffer of immunity was not legally sufficient," but, following a petition for rehearing, changed its opinion to hold that:

> "There is no validity to the argument that the proffer of immunity was not legally sufficient" (Appendix B, *infra*, p. 18a).

The sufficiency of the proffer of immunity to compel petitioner to testify concerning the period he lived in Canada is crucial to petitioner's motion to withdraw his plea; if, contrary to the decision below, there is validity to the argument that the proffer of immunity was not legally sufficient to compel petitioner to testify concerning the period he lived in Canada, petitioner should have been permitted to withdraw his plea, there being no dispute that he did not understand the legal efficacy of such defense.

This Court has made clear that a witness has "a constitutional right to stand on the privilege against self-

incrimination until it has been fairly demonstrated to him that an immunity, *as broad in scope as the privilege it replaces,* is available and applicable to him." *Stevens* v. *Marks,* 383 U.S. 234, 246 (1966) (emphasis added). The question here is whether the scope of the privilege against self-incrimination encompasses statements which could incriminate the witness in a foreign jurisdiction, as to which the grant of immunity offers no protection from prosecution.

This Court has never ruled on this important question.* However, in rejecting petitioner's contention that the grant of immunity was legally insufficient to protect him from prosecution in Canada, the Court below is in conflict with the clear import of and express statements in this Court's opinion in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964).

The specific issue in *Murphy* was the sufficiency of a state grant of immunity to compel testimony which might incriminate the witness under federal criminal laws. This Court there held that a witness could not be compelled to testify under a grant of immunity from state or federal prosecution if he was subject to prosecution under the other jurisdiction.

The two cases on which this Court relied most heavily in *Murphy,* and which it repeatedly cited with approval, were *East India Co.* v. *Campbell,* 1 Ves. sen. 246, 27 Eng.

* Another important issue not previously decided by this Court may be implicitly intertwined in this issue: whether one state can use a grant of immunity to compel testimony which incriminates the witness under the laws of another state.

Rep. 1010 (1749), and *United States of America* v. *McRae*, L.R., 3 Ch. App. 79 (1867). The square holding of these English decisions, which represent the "settled English Rule" (378 U.S. at 63),* was that "[t]he rule [against self-incrimination] did 'protect witnesses against disclosing offenses in violation of the laws of another country' " (378 U.S. at 72). The *Murphy* opinion firmly rejected the notion that the purpose of the privilege against self-incrimination was merely to protect against "the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling *that same Government* to convict a man out of his own mouth" and instead accepted "as correct the construction given the privilege by the English courts." 378 U.S. at 77 (emphasis added).

Although the precise issue in *Murphy* was the sufficiency of a state grant of immunity to compel testimony incriminatory under federal law, it is clear beyond doubt that this Court there subscribed to the view of the cited English cases that a witness cannot be compelled in one country to answer questions which would incriminate him under the laws of another country. The tenor of the *Murphy* opinion affords no grounds for distinguishing the two-country situation from the federal-state situation there presented. The "cruel trilemma of self-accusation, perjury or contempt" which the self-incrimination clause was designed to avoid (378 U.S. at 55), is as real whether the witness is faced with the prospect of prosecution at home or abroad.

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* This rule is also followed, as noted in *Murphy*, 378 U.S. at 77, by Canada, Australia and India. See Grant, *Federalism and Self-Incrimination: Common Law and British Empire Comparisons*, 5 U.C.L.A. L. Rev. 1 (1958).

This Court should now rule squarely upon the question here raised, which was not presented in *Murphy*, but was decided by the Court below in clear conflict with the applicable dictates of the *Murphy* opinion.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 14, 1969

APPENDIX A

Constitutional and Statutory Provisions

1. United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. §401

§401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

Appendix A

3. Rule 7, Federal Rules of Criminal Procedure

Rule 7. The Indictment and the Information

(a) *Use of Indictment or Information.* An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) *Waiver of Indictment.* An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the

statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) *Surplusage.* The court on motion of the defendant may strike surplusage from the indictment or information.

(e) *Amendment of Information.* The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) *Bill of Particulars.* The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires. As amended Feb. 28, 1966, eff. July 1, 1966.

4. Rule 32, Federal Rules of Criminal Procedure

Rule 32. Sentence and Judgment

(a) *Sentence.* Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) *Judgment.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) *Presentence Investigation*

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) *Probation.* After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

5. Rule 34, Federal Rules of Criminal Procedure

Rule 34. Arrest of Judgment

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

APPENDIX B

Opinions Below

Opinion of the United States District Court for the Northern District of Ohio, Western Division, July 11, 1968

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

No. CR 68-17

UNITED STATES OF AMERICA,

vs.

HYMAN STERNMAN.

YOUNG, J.:

The defendant has filed a motion in two branches: the first, pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, to set aside the judgment of conviction herein and to withdraw the plea of guilty heretofore entered, in order to correct manifest injustice; the second, pursuant to Rule 34 of the Federal Rules of Criminal Procedure to arrest the judgment, since the indictment

does not state facts sufficient to constitute an offense against the United States. The Court concludes that the motion is not well taken as to either of its branches, and should be overruled.

Taking the two branches of the motion in reverse order, the defendant's arguments as to the sufficieny of the indictment are based on the contention that the indictment must include a vast amount of purely evidenciary allegations. Defendant apparently seeks a return to ancient practices, where indictments went on interminably. The present rules were designed to obviate the necessity for such prolixity. The indictment could leave no doubt in anyone's mind what the defendant was charged with doing, and would amply support any claim of double jeopardy if he were again charged with the same offense. Since these important tests are satisfied, the indictment is sufficient.

The first branch of the motion poses somewhat more problems. It is often hard to derive from a cold record an accurate picture of what the trier of the facts really saw and heard. An able advocate, picking the strongest portions of the record as a text for his arguments, can be powerfully persuasive.

So in this case, the defendant's picture of himself as a poor, humble, and ignorant individual, crushed and beaten by powerful forces that he could neither understand or cope with, is an appealing one.

He did not look or sound so appealing to the Court in his appearances before it. Telling the truth before a grand jury did not suit him, even though he was granted immunity from prosecution. No doubt he had good reason for his refusal. A number of such quickly occur to anyone

reasonably familiar with crime and criminal procedures. His attitude was the most completely contemptuous that there can be, the cold determination not to comply with the orders of the Court, regardless of any penalties the Court might impose.

The defendant gambled that these penalties might be little or nothing. Having lost, he wants to avoid them by a plea that it is unjust to hold him to the consequences of his decision. The Court is unsympathetic to such efforts. The defendant was not taken advantage of, overborne, or treated unjustly. His motion is overruled.

The District Attorney may draw and submit an entry accordingly.

DON J. YOUNG
United States District Judge

Toledo, Ohio.

Appendix B

Opinion of the United States Court of Appeals for the Sixth Circuit, June 24, 1969

No. 18966

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HYMAN STERNMAN,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio, Western Division

Decided June 24, 1969

Before: WEICK, Chief Judge; PHILLIPS and COMBS, Circuit Judges.

COMBS, Circuit Judge. The appellant, Hyman Sternman, was sentenced to three years imprisonment after pleading guilty to an indictment charging contempt of court. The district court denied his motion filed under Rule 32(d), Federal Rules of Criminal Procedure, to set aside the conviction and permit withdrawal of the plea of

guilty and a motion filed under Rule 34, Federal Rules of Criminal Procedure, to arrest the judgment.

The contempt charge arose when Sternman, already a federal prisoner, was subpoenaed to testify before a federal grand jury which was investigating interstate gambling activities. He agreed to answer any questions pertaining to his activities in the United States but would answer no questions about his activities during a period he had resided in Canada. Immunity was proffered under 47 U.S.C. § 409(1) and, when Sternman still refused to answer, he was taken before the presiding judge, the Honorable Don J. Young. Judge Young explained the functions of the grand jury and the concept of immunity. Since Sternman was not represented by counsel, he was told by the United States Attorney and by the judge that he should have a lawyer and that the proceedings would be continued until he could consult with one. Sternman stated that he did not desire a lawyer. He said, "I have told the grand jury I would not answer any questions on the years I lived in Canada, on the grounds that it might tend to incriminate me. But of every day I lived in the United States I will answer anything they want." Judge Young advised Sternman that a witness before a grand jury cannot withhold evidence on the ground that it might tend to incriminate him if he is granted immunity from his own self-incrimination, and that if he refused to answer questions he would subject himself to charges of contempt. Sternman made it clear that he would refuse to answer questions concerning his activities in Canada. The judge ordered him to return to the grand jury room and to answer any

questions put to him by Government attorneys. Upon returning to the grand jury room, he again refused to answer and the grand jury indicted him for contempt of court.

Five days later, Sternman was brought before Judge Young to plead to the indictment. The judge again commented upon the absence of counsel and offered to delay the case to enable him to obtain counsel. The judge also offered to appoint counsel although Sternman was not indigent. Sternman chose to proceed without counsel, saying at one point, "I feel as though I can explain it a lot better than an attorney."

Sternman directed several questions to the judge concerning his legal rights, the powers of the Justice Department, and why he had not been cited for contempt on a previous refusal to give grand jury testimony. He was then called upon to enter a plea to the indictment. He replied, "I plead guilty, but not for not answering questions to the Grand Jury as you have ordered me to." He was questioned further and indicated that he understood the charge and the possible consequences of a plea of guilty; he also stated that the plea was freely entered.

Two days later, Sternman was brought before Judge Young for sentencing. He was told then that he could withdraw his plea of guilty and receive a jury trial if he so desired. Sternman replied, "I pleaded guilty to not obeying your order. I still stand on it." The judge imposed sentence to commence at the end of the sentence Sternman is now serving.

On the Rule 34 motion it is argued that the indictment should have been dismissed for failure to allege the "essen-

tial facts constituting the offense charged" as required by Rule 7(c), Federal Rules of Criminal Procedure. On his motion to withdraw his plea of guilty, Sternman contends (1) he did not knowingly enter an unequivocal plea of guilty; (2) he did not make a valid waiver of counsel; and (3) the court failed to make the inquiries required under Rule 11, Federal Rules of Criminal Procedure, before accepting the plea of guilty.

Looking first to the Rule 34 motion, we think the indictment was sufficient.[1] Rule 7(c) requires only that "the indictment or information shall be plain, concise and contain a definite written statement of the essential facts constituting the offense charged." The charge must be in sufficient detail that the accused can plead former jeopardy in case he is later charged with a similar offense arising out of the same facts. *Cochran and Sayre* v. *United States*, 157 U.S. 286, 290 (1895). Also see *Russell* v. *United States*,

1. The body of the indictment read as follows:
"The Grand Jury charges:

COUNT I.

That on the 14th day of February, 1968 within the Northern District of Ohio,

HYMAN STERNMAN,

the defendant herein, having received a lawful order of a Court of the United States, in open court, to-wit: to return to the Grand Jury room, where the defendant,

HYMAN STERNMAN

was then a witness, in the Grand Jury proceeding, and the further lawful order to answer the questions to be asked in the conduct of the Grand Jury proceeding, did unlawfully, willfully, and knowingly disobey the said lawful order of the Court of the United States, in that he refused to answer the questions asked of him in the course of the Grand Jury proceeding, all in violation of Section 401 of Title 18 United States Code."

369 U.S. 749 (1962); *United States* v. *Debrow*, 346 U.S. 374 (1953).

Sternman, while admitting that the present indictment would be adequate to bar future prosecutions on the same offense, argues that the essential facts were not specifically stated. It is asserted that the charge that appellant had disobeyed a lawful order of the court was a mere conclusory statement and for that reason inadequate. It is contended that facts should have been alleged which, if proven, would have established the lawfulness of the order, that is, a valid proffer of immunity and the specific questions Sternman refused to answer.

Appellant relies upon *Russell* v. *United States*, supra, as support for his position. The indictments in *Russell* charged contempt of Congress under 2 U.S.C. §192. The charge in that case was refusal to answer questions "pertinent to the question then under inquiry" but the subject of the inquiry was not identified. The indictments were found to be defective by reason of this omission. We think *Russell* is inapplicable here. The Court in that case pointed out the difficulty in trying to ascertain "the question under inquiry." Indeed, there was some confusion as to the subject of the congressional investigation out of which the contempt charges originated. That problem is not present here.

It is not the grand jury's function to delve into the legal and factual basis for the court's order and make a finding that it was legal. It needs only to find that the accused violated an order of the court regular on its face, leaving the propriety of the order for the court, subject to appellate review. We hold that the indictment adequately apprised

Sternman of the charges against him and was otherwise legally sufficient. *United States* v. *Debrow,* supra; *Hupman* v. *United States,* 219 F.2d 243 (6th Cir. 1955), *cert. denied,* 349 U.S. 953 (1955); *Butzman* v. *United States,* 205 F.2d 343 (6th Cir. 1953), *cert. denied,* 346 U.S. 828 (1953).

Sternman's motion to be permitted to withdraw his plea of guilty, filed after imposition of sentence, was properly denied. Rule 32(d), Federal Rules of Criminal Procedure, provides:

> "A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Thus, Sternman's motion to withdraw his plea can succeed only if "manifest injustice" be shown. There was no such showing.

In advancing the argument that Sternman did not enter an unequivocal plea of guilty, reliance is placed on *Hulsey* v. *United States,* 369 F.2d 284 (5th Cir. 1956). It is true that, when called upon to enter his plea, appellant stated, "I plead guilty, but not for not answering questions to the Grand Jury as you have ordered me to." If faced only with this version of the plea, reversal on the strength of *Hulsey* would seem to be required. However, Sternman clarified his position in his extensive colloquies with Judge Young. When he was first brought before the judge, we find him making these statements:

> "I am not going to answer any questions, your Honor. I'm sorry. You can do anything you want.
>
> * * *

Appendix B

> "I refuse to answer any questions on ground that it might tend to incriminate me. You can order me for contempt."

Later, when he entered his plea, he said:

> "There's no chance of my answering, no chance whatsoever, because of the conditions thrown at me."

At his sentencing proceeding two days after entering his plea of guilty, this exchange took place:

> "The Court: * * * If you wish, I will permit you to withdraw your plea of guilty and enter a plea of not guilty and hold it over for jury trial.
>
> "Mr. Sternman: I pleaded guilty to not obeying your order. I will stand on it."

This statement removed any possible ambiguity and cured any defect which might have existed in the plea of guilty previously entered. It is apparent from the exchange between Judge Young and the appellant, both before the entry of his plea and before imposition of sentence, that Sternman fully understood the nature of the charge and the consequences of a plea of guilty. It is also perfectly clear from his remarks to the judge that he had made a deliberate choice to disobey the court's order and to take his chances on a contempt proceeding, apparently in the belief that he could not legally be required to answer questions concerning his activities in Canada. There is no contention here that the proffer of immunity was not legally sufficient.

No less than ten times Sternman was told of his right to counsel. He was offered a delay in the proceedings to enable him to consult with counsel and he was offered the services of appointed counsel. It is noted, too, that, when

he was first brought before Judge Young, Sternman stated he had talked with his counsel on the day before the hearing. It may be reasonably inferred, therefore, that appellant made a deliberate choice not to have counsel in the contempt proceedings. It is well settled, of course, that a defendant in a criminal case has a constitutional right to counsel unless he has made a valid waiver of the right. *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948); *Meadows* v. *Maxwell*, 371 F.2d 664 (6th Cir. 1967). But, a court may not compel a defendant to have the services of counsel. A defendant has a constitutional right to represent himself. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942). It is clear from this record that Sternman chose to exercise that right.

The remaining contention is that the court failed to comply with the requirements of Rule 11 before accepting Sternman's plea of guilty. Rule 11 requires the court to determine that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea; also that there is a factual basis for the plea. We have examined the proceedings here in light of the recent decision in *McCarthy* v. *United States*, —— U.S. ——, decided April 2, 1969, and are of the opinion that Judge Young complied with all the requirements of Rule 11 as construed in *McCarthy*. We note, too, that *McCarthy* does not have retroactive effect. *Halliday* v. *United States*, —— U.S. ——, 37 U.S.L.W. 3419. It seems to us that the judge leaned backwards not only in his efforts to convince appellant he should have counsel but also in fully explaining to him the nature of the charge and the consequences

of a guilty plea. Illustrative of Sternman's knowledge of the situation is his response to the judge's explanation that there was no statutory limit to the penalty which might be imposed for contempt of court. He replied, "Well, I have to take my chances."

Sternman was not a novice in his familiarity with court proceedings and pleas of guilty. The sentence which he was then serving was imposed after a plea of guilty. Moreover, it appears from the record that Sternman is an experienced, astute individual with confidence in his ability to take care of himself. We are convinced from a review of the entire record that his rights were fully protected and that there is no reversible error.

Judgment affirmed.

Appendix B

Opinion of the United States Court of Appeals for the Sixth Circuit on Petition for Rehearing, October 17, 1969

No. 18,966

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HYMAN STERNMAN,
Defendant-Appellant.

Before: PHILLIPS, Chief Judge, and WEICK and COMBS, Circuit Judges.

Appellant's petition for rehearing presents no issue not previously considered by the Court. However, the Court's opinion is amended to delete the last sentence of the first paragraph on page 6, which reads "[t]here is no contention here that the proffer of immunity was not legally sufficient," and substitute therefor the following language:

> "There is no validity to the argument that the proffer of immunity was not legally sufficient."

Upon consideration, the petition for rehearing is denied.